

MALAYSIAN PHILHARMONIC ORCHESTRA

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v.

ARNE WALTER NECKELMANN

HIGH COURT MALAYA, KUALA LUMPUR

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AZIAH ALI J

[JUDICIAL REVIEW NO: R1-25-226-09]

5 APRIL 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Industrial Court - Failure of Industrial Court to properly consider totality of evidence and relevant facts - Whether Industrial Court erred in finding that employee was constructively dismissed*

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EMPLOYMENT: *Contract of employment - Misconduct - Re-designation of employee - Whether employer may impose a lesser punishment than that provided for in contract of employment*

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LABOUR LAW: *Employment - Constructive dismissal - Re-designation of employee - Whether employee constructively dismissed - Whether amounting to dismissal without just cause or excuse - Whether employee's acts amounted to misconduct - Industrial Relations Act 1967, s. 20*

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The applicant is an organizer of musical performances. The respondent was employed by the applicant as Section Principal, Cello. The respondent commenced his employment with the applicant on 16 August 2004 for a two year term. In September 2004 several musicians complained to the applicant that the respondent was conducting himself in an unprofessional and highly unbecoming manner with respect to one Csaba Koros, his regular stand partner. The respondent was said to have berated Csaba Koros in front of everyone. This was not the first time that such an issue had come to light. The respondent *vide* letter dated 27 June 2004 had in fact been accorded with a stern warning in respect of his lack of leadership as a result of the occurrence of several incidences. Pursuant to incidents that occurred in September 2004, *vide* letter dated 10 November 2004 the applicant asked the respondent to show cause why disciplinary action should not be taken against him. The respondent denied the allegation therein. The respondent was then given another letter dated 13 December 2004 wherein he was notified that for the week commencing from 13 December to 19 December 2004 he would be rotated off, with pay. The respondent was instructed

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- A to attend his first rehearsal on 5 January 2005. The respondent responded by letter dated 17 December 2004 stating that the applicant had seriously damaged the relationship of mutual trust and confidence that should exist between him and the applicant. Therefore he considered himself constructively dismissed by the
- B applicant with immediate effect. The respondent then filed a claim for reinstatement pursuant to s. 20 of the Industrial Relations Act 1967 ('the Act'). The learned Industrial Court Chairman found that the respondent was entitled to consider himself constructively dismissed based on the applicant's action of re-designating the
- C respondent from the position of Section Principal, Cello to Tutti Cello and re-adjusting his salary. The learned Chairman was of the view that the applicant was contractually not entitled to do so. The applicant applied for an order of *certiorari* pursuant to O. 53 of the Rules of the High Court 1980 to quash the award of the
- D Industrial Court.

Held (allowing the application and quashing the award of the Industrial Court):

- E (1) In order to decide whether the respondent was dismissed without just and reasonable cause, the Industrial Court had to first decide whether the respondent's act amounted to a misconduct. It is only when the impugned act is not a
- F misconduct that the respondent can be successful in his representation under s. 20 of the Act. (para 26)
- G (2) If the contract of employment permits the applicant to dismiss the respondent for misconduct hence the applicant would also be permitted to impose a lesser punishment if the circumstances warrant it even though the contract of
- H employment contains no such provision. Further, re-designation of a higher position to a lower position had been the course of action taken by the applicant in other cases of misconduct in the applicant's organization. (para 29)
- I (3) The learned Chairman had not taken into consideration the warning letter dated 27 June 2004 which showed that the applicant had issues regarding the respondent's conduct and which was not challenged. The Chairman had not considered that the respondent had not challenged the applicant's right to issue a warning of a possible demotion in the event of

future incidents happening. The learned Chairman had also not given consideration to the fact that the respondent was a member of an orchestra where a harmonious and cordial relationship among the members is a requisite and unprofessional behaviour is not in the best interest of the applicant. (para 30)

- (4) The respondent was not sacked. In fact he was asked to attend rehearsal on 5 January 2005. Had the learned Chairman considered the totality of the evidence and considered relevant matters, he would not have reached the conclusion that the respondent was dismissed. (para 31-32)

Case(s) referred to:

- Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 CA (*refd*)
- Expressway Lingkaran Tengah Sdn Bhd v. Susheela Saminathan* [2006] 1 ILR 505 (*refd*)
- Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy* [2008] 1 CLJ 760 CA (*refd*)
- Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 LNS 150 FC (*refd*)
- Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC (*refd*)
- PP v. Kok Wah Kuan* [2007] 6 CLJ 341 FC (*refd*)
- Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA (*refd*)
- Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC (*refd*)
- Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 (*refd*)

Legislation referred to:

- Child Act 2001, s. 97(2)
- Employment Act 1955, s. 14
- Evidence Act 1950, s. 114(g)
- Industrial Relations Act 1967, ss. 20, 33B(1)
- National Land Code, s. 418
- Rules of the High Court 1980, O. 53

For the applicant - Vijayan Venugopal; M/s Shearn Delamore & Co
For the respondent - SK Cheong; M/s Teh Lai & Lai Partnership

Reported by Amutha Suppayah

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JUDGMENT

Aziah Ali J:

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[1] This is an application for order of *certiorari* pursuant to O. 53 of the Rules of the High Court 1980 to quash the Award of the Industrial Court No. 691 of 2009 dated 9 June 2009 wherein the Industrial Court concluded that the respondent was entitled to consider himself constructively dismissed from the services of the applicant on the ground that the applicant was not contractually entitled to re-designate the respondent from the position of Section Principal, Cello to that of Tutti Cello and to adjust the respondent's salary accordingly. The respondent was awarded compensation of USD65,184 and RM21,000 *in lieu* of reinstatement after a deduction of 30% on the ground that the respondent contributed to some extent to his dismissal.

Background

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[2] The applicant is an organizer of musical performances under the name and style of 'The Malaysian Philharmonic Orchestra'. The respondent was employed by the applicant as Section Principal, Cello. The facts as found in the applicant's affidavit (encl. 3) are as follows:

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(i) the respondent commenced his employment with the applicant with effect from 16 August 2004 *vide* a contract of employment dated 13 April 2004;

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(ii) by Item 3.1 of the contract of employment parties expressly agreed that the respondent's tenure of employment would be for a fixed period, ie, from the period 16 August 2004 till 15 August 2006;

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(iii) the respondent left the employment of the applicant with effect from 17 December 2004 as he considered himself constructively dismissed.

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[3] According to the applicant the events which led to the respondent considering himself constructively dismissed are as follows:

- 3.1 Sometime around 17 September 2004, it was brought to the applicant's attention that on 17 September 2004 the respondent had conducted himself in an unprofessional and highly unbecoming manner with respect to one Csaba Koros, his regular stand partner. The respondent had also acted in the same untoward manner towards Csaba Koros the following day, ie, on 18 September 2005; A
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- 3.2 This in turn resulted in several musicians highlighting to the applicant their unhappiness in respect of the manner in which the respondent had berated Csaba Koros in front of everyone. Even the guest conductor, one Mr. George Pehlivanian had expressed to the applicant his displeasure in relation to how the respondent had spoken to Csaba Koros during the foregoing occasion; C
- 3.3 According to the applicant, the foregoing occasion was not the first time that such an issue had come to light but was in fact one of many. The respondent *vide* letter dated 27 June 2004 had in fact been accorded with a stern warning in respect of his lack of leadership as a result of the occurrence of several incidences, as contained in the aforesaid letter. The letter reads as follows: D
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- June 27/04
- Arne Neckelmann
Section Principal Cello
Malaysian Philharmonic Orchestra
- Dear Arne
- Re: Leadership and lack thereof - Formal Warning** F
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- This is to inform you that, in my opinion, your file is full of notations which, taken together show a lacking in positive leadership qualities. I cite the three most recent examples:
1. Your on again/off again approach to playing Pierrot Lunaire. (Letter from Mervyn Peters filed with you on May 12/04.) Your behaviour in this matter does not display any sense of good leadership. Future actions of this sort simply will not be allowed. H
2. Your formal complaint re: Steve Retallick striking you, and other charges. (May 27/04). No one has even considered condoning Mr Retallick's behaviour. It was inexcusable. Because of the gravity of that situation, his defense was – at I

- A that time – ignored. However, you have been given a copy of Mr Retallick’s response to your charges. He makes countercharges against you which are on file for any future reference. He specifically challenges your charge that he “sabotaged the concerts” and reiterates longstanding complaints about your leadership.
- B 3. Mr Umarov’s Cello. In this matter, which is not yet fully closed, you have used extremely bad judgment by pointing a finger of guilt without the benefit of clearly established proof. You have considerably upset many of your colleagues, the MPO administration, and DFP stage crew. With what appears to have been an unattributable accident, you (with Mr Umarov) have caused major upset across the whole organization. In your attempt to lay blame somewhere, you have needlessly sewn seeds of mistrust. This was completely uncalled for, and very unbecoming of a good leader.
- C
- D This is a formal warning. Any future incidents in which you are involved which lead to unnecessary conflict with the MPO/DFP, or any other behaviour which can be adjudged as bad leadership may lead to you being demoted from your position as Section Principal Cello.
- E Yours truly
- Sgd
- F C. Stephen Smith
General Manager
- cc Mervyn Peters, Orchestra Manager, and appropriate files
Mahani Yahya, Manager - Human Resources Management
- G I acknowledge receipt of this letter: Sgd Date: 27/06/04
- H [4] Pursuant to incidents that occurred on 17 and 18 September 2004, *vide* letter dated 10 November 2004 the applicant asked the respondent to show cause why disciplinary action should not be taken against him. The said letter reads as follows:
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10 November 2004

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Mr Arne Neckelmann
Section Principal Cello
Malaysian Philharmonic Orchestra

Dear Mr Neckelmann

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Show Cause Notice

Please be informed that Management has received information as follows:

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On Friday, 17 September 2004, you spoke to your stand partner, Mr Csaba Koros, in a loud, disruptive and unprofessional manner during a rehearsal, which resulted in a complete disruption of the flow of the rehearsal and offending Mr George Pehlivanian, the conductor, on the podium and your colleagues.

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On Saturday, 18 September 2004, you began to speak to Mr Koros again in a similarly disruptive manner.

Your actions above contravene Clause 1 of the Code of Conduct as contained in the Musicians' Handbook which states:

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The Musician will at all times be expected to behave in a respectable and professional manner, paying due regard to the interests of the Orchestra and of the Employer.

If you are found to be in breach of the abovementioned Clause, disciplinary action can be taken against you under Clause 6 of the said Code of Conduct.

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You are hereby given seven (7) days from the date of receipt of this notice to provide reasonable explanation on why such disciplinary action should not be taken against you.

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If you fail to provide the explanations as demanded above, further action will be taken against you on reports and facts.

Please acknowledge receipt of this letter and return it to me immediately.

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Yours sincerely

Sgd

C Stephen Smith
General Manager
Malaysian Philharmonic Orchestra

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- A Cc Abd Hamid Abu Bakar
CEO

Kees Bakels
Principal Conductor and Artistic Advisor
- B Mervyn Peters
Orchestra Manager

Notice Of Acknowledgement

- C I, Arne Neckelmann hereby accept this notice dated 10 November 2004 and fully understand its contents.

Sgd 10.11.2004

- [5] The respondent responded to the show cause letter by a letter dated 12 November 2004 wherein he denied the allegation that had been levelled against him. Together with his letter, the respondent enclosed a supporting letter dated 15 November 2004 from one Mr. Thomas Meining who was at the material time a substitute concertmaster with the applicant. In his letter the respondent amongst others denies that his action contravenes cl. 1 of the Code of Conduct as contained in the Musicians' Handbook and denies that the words he used to Csaba Koros were derogatory, offensive or foul. He states that the tone he used when addressing Mr. Koros was polite and was in no way abusive and that he had behaved in a professional manner.

- F [6] The respondent was requested to attend a meeting on 13 December 2004 with C Stephen Smith, the General Manager and at the said meeting the respondent was handed a letter which reads as follows:

- G 13 December 2004

Mr Arne Neckelmann
Section Principal, Cello
Malaysian Philharmonic Orchestra

- H Dear Mr Neckelmann,

- I We refer to the above matter, to our show cause notice dated 10 November 2004 and to your response dated 12 November 2004 (which was received on 18 November 2004).

We regret to inform you that we are unable to accept your purported explanation. We also note with concern that this incident was the most recent in a long list of circumstances and situations in which you have displayed behaviour totally inconsistent with the leadership expected of you as Section Principal, Cello.

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As you are aware, you were issued with a formal warning dated 27 June 2004, citing three examples of your lack of positive leadership qualities. You were put on notice that any future incidents in which you are involved which lead to unnecessary conflict within the MPO/DFP or any other behaviour which can be adjudged as bad leadership may lead to you being demoted from your position as Section Principal, Cello.

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In the circumstances and in the light of your past record, we are unable to repose the necessary trust and confidence in you to continue to discharge your duties as Section principal, Cello. You will accordingly be re-designated to the position of Tutti Cello with effect from 1 January 2005. Your remuneration will be adjusted to US\$45,479 per annum. All other terms and conditions will remain the same.

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Yours truly

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Sgd

Abd Hamid Abu Bakar
Chief Executive Officer

[7] The respondent was also accorded with another letter dated 13 December 2004 wherein he was notified that for the week commencing from 13 December to 19 December 2004 he would be rotated off, with pay. The respondent was instructed to attend his first rehearsal on 5 January 2005. The respondent responded by letter dated 17 December 2004 wherein amongst others he stated his belief that the applicant has seriously damaged the relationship of mutual trust and confidence that should exist between him and the applicant. Therefore he considers himself dismissed by the applicant with immediate effect.

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[8] The respondent then filed a claim for reinstatement pursuant to s. 20 of the Industrial Relations Act 1967 ("the Act") and his representation was then referred to the Industrial Court. In his Statement of Case dated 27 April 2005 the respondent amongst others stated that in the letter of re-designation the applicant merely cited previous formal warnings, none of which were

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- A included in the Show Cause Notice and failed to conduct the necessary inquiries to allow the parties concerned the opportunity to explain, rebut and to test the allegations under cross-examination. Therefore the respondent considers himself constructively dismissed or alternatively he was dismissed without just cause. The respondent states that the action by the applicant was unfounded, capricious, actuated by malice and/or was made in bad faith.

Preliminary Objection

- C [9] At the commencement of hearing of this application counsel for the respondent raise a preliminary objection. In essence it is submitted that the application for judicial review is misconceived and bad in law on the ground that s. 33B(1) of the Act has ousted the review jurisdiction of this court. In support counsel D cites the case of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 and *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 LNS 150. In *PP v. Kok Wah Kuan* the issue canvassed by the court was the doctrine of separation of powers and the constitutionality of s. 97(2) of the Child Act 2001. E Abdul Hamid Mohamad PCA (as His Lordship then was) in his judgment said *inter alia*:

- F The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' So, we will have to look at the federal law to know the jurisdiction and powers of the courts ...

- G In the case of *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* the issue was the true interpretation of s. 418 of the National Land Code. These two cases are not concerned with the Act and are not in point.

- H [10] The issue of s. 33B(1) of the Act has been considered by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 cited by counsel for the applicant. Gopal Sri Ram JCA (as His Lordship then was) said *inter alia* as follows:

- I The next topic that requires consideration is the ability of the High Court to exercise judicial review over awards of the court in the face of a privative clause. The attempt by Parliament to exclude judicial review is, in this instance, expressed in s. 33B(1) of the Act which provides as follows:

(1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

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His Lordship said further:

In my judgment the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahrulzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

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His Lordship then said:

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

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[11] In the earlier Supreme Court case of *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 Eusoffe Abdoolcader SCJ in his judgment said *inter alia* as follows:

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... Section 33B(1) of the Industrial Relations Act enacts a privative clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act. I held in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2)* that a privative clause of this nature is not operative in the face of a jurisdictional defect or fraud and has no effect at all as regards jurisdictional review ...

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On the basis of the aforementioned authorities I am unable to agree with the respondent's counsel and I dismissed the preliminary objection.

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A The Application For Judicial Review

[12] In the award the learned Industrial Court Chairman had concluded that the respondent was entitled to consider himself constructively dismissed with effect from 17 December 2004 based on the applicant's action of re-designating the respondent from the position of Section Principal, Cello to Tutti Cello. The Industrial Court had arrived at the foregoing conclusion as the Learned Chairman was of the considered view that the applicant was contractually not entitled to do so. At p. 15-16 of the award the learned Chairman stated as follows:

Hence, on the first issue of whether there was a constructive dismissal of the Claimant in this case, the question that has to be examined is whether the re-designation of the claimant goes against what was provided for under the contract.

The contract between the Claimant and the Company clearly provides that the Claimant is being engaged as Section Principal, Cello as in clause 2.1. Taking away the position of Section Principal, Cello from the Claimant and giving him another position is not in accordance with the provisions of the contract and therefore is a breach of the fundamentals of the contract that goes to the root of the contract. The Claimant was not being employed as a musician, where it can be argued that he can posted anywhere in the Orchestra as a player, but he has a specific designation in the Orchestra.

The next issue is whether the Company has the right to re designate the Claimant to the post of Tutti Cello. Though the Company argues that the Company has the right to do so under clause 14.2, but clause 14.2 merely deals with how disciplinary matters are to be handled and the rights of the Musician in a disciplinary proceeding. It does not provide for punishment and nowhere in the contract that says the Claimant can be demoted or be re-designated as a punishment for disciplinary misconduct. If any, it is provided for under clause 13.1 that says, if the Musician is guilty of any serious misconduct, the Employer has the right to terminate the Musician's employment.

H Submissions For The Applicant

[13] Counsel for the applicant submits that in arriving at the above conclusion, the learned Chairman has committed several errors of law. It is submitted that for the applicant, the crux of the matter is whether the applicant has a right to demote the respondent. The applicant had in the past re-designated one of its musicians.

[14] In the respondent's contract of employment, cl. 14.2 provides as follows: A

14.2 Matters of a disciplinary nature will be handled according to the particular circumstance and in accordance with the Orchestra's disciplinary procedure. Before action is taken the Musician shall be informed of the nature of the complaint against him and shall be given the opportunity to state his case either personally or by his representative to the Orchestra Management, who shall give full consideration to such representation. B

Counsel submits that pursuant to cl. 14.2 the applicant could exercise its discretion to re-designate a musician should the circumstances warrant that such an action be taken, as was done with the respondent. C

[15] It is submitted that the learned Chairman had failed to appreciate that during the course of the proceedings, the respondent had never at any time put to the applicant's witnesses that it was not open for the applicant to re-designate the respondent to a lower position with correspondingly lower salary even though it was the respondent's case that the applicant could not do so. It was never put to the applicant's witnesses that the applicant does not have a right to demote the respondent. Counsel submits that the respondent's failure to cross examine the applicant's witnesses in respect of this pertinent issue amounts to the respondent accepting and admitting the applicant's contention that it could re-designate the respondent to a lower position with a correspondingly lower salary (*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639). Hence if the applicant has such a right to demote, then the demotion cannot amount to constructive dismissal. D E F G

[16] Counsel submits that if an employer may by law impose on its employees the ultimate punishment of dismissal for committing misconduct, it naturally follows that an employer can by law impose on its employee with a lesser punishment, including the punishment of demotion. As illustration counsel refers to s. 14 of the Employment Act 1955. Therefore it is submitted that it was lawful for the applicant to re-designate the respondent to a lower position irrespective of whether or not the contract of employment makes provision for it. H I

- A [17] Counsel further submits that the learned Chairman had failed to address his mind to the issue that the respondent has failed to discharge the burden of proof. The Chairman has also found that the applicant has no right to demote the respondent although this issue was not pleaded. Therefore counsel submits that that the
B learned Chairman has committed an error of law and has gone beyond its jurisdiction in deciding an issue not pleaded.

- [18] The applicant says that the incidents complained of were not the first time where the respondent had behaved in such a manner. His interpersonal skills and leadership skills were cause for concern to the applicant since early January 2003. The applicant issued the formal warning letter dated 27 June 2004 and informed the respondent that any future incidents in which he is involved which lead to unnecessary conflict with the applicant/DFP or any
C other behaviour which can be adjudged as bad leadership may lead to him being demoted from his position as Section Principal. In the proceedings before the Industrial Court the respondent acknowledged the formal warning and agreed that he had not at any time disputed the contents of the letter. The warning letter
D was not challenged. Counsel submits that the Industrial Court failed to address its mind to the warning letter which shows the intention of the parties.
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- [19] The learned Chairman found that the respondent was not an easy person to work with and had a personality not in harmony with the other musicians in the orchestra. In the subsequent portion of the award the learned Chairman found that the respondent should not have been accorded with the punishment of dismissal since the subject matter of the incidents complained of were related to professional work and not personal.
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G Counsel submits that this was exactly what the applicant had done.

- [20] Counsel submits that had the learned Chairman taken into account all the foregoing relevant facts, the learned Chairman would not have arrived at the conclusion that he did, and by failing to take into account the foregoing relevant issues before he arrived at the conclusion the learned Chairman had thereby committed errors of law. The conclusion arrived at is therefore perverse and devoid of any plausible justification which no other
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I body or tribunal similarly circumstanced would have arrived at. Further by considering a matter that was not pleaded the learned Chairman had therefore acted beyond his jurisdiction.

Submissions For The Respondent

[21] For the respondent counsel submits that at the time the warning letter was given, it was speculative to challenge the applicant's right to demote the respondent. Further it is submitted that the warnings given to the respondent had nothing to do with the events leading to the demotion. The warning letter was not included in the show cause notice. Therefore it was not an issue and hence it was not necessary to put it to the witnesses.

[22] Counsel submits that on the authority of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298, a demotion can amount to a dismissal if there is evidence that the demotion is a fundamental breach that goes to the root of the contract of employment. It is incumbent upon the applicant to show that the demotion was done with just cause.

[23] It is submitted that the respondent had denied the allegation that he berated Csaba Koros or that he had conducted himself in such a manner that amounts to constructive dismissal. Counsel raised the issue of the applicant not calling the musician that the respondent was alleged to have berated. Therefore it is submitted that there is no certainty that he was in fact berated. The applicant's witness Mervyn Peters was not present during the alleged incidents. The Chief Executive Officer who signed the re-designation letter was also not present. Therefore counsel urged the court to invoke s. 114(g) of the Evidence Act 1950 against the applicant.

[24] Counsel for the respondent agrees that the issue of whether the applicant has power to demote does not arise and it was never an issue as the parties accepted that the applicant has the power to demote. In response counsel for the applicant submits that since counsel for the respondent conceded that the applicant's power to demote the respondent is not an issue, therefore the Industrial Court had taken into consideration an irrelevant matter which is a ground for *certiorari*.

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A Decision

B [25] In the proceedings before the Industrial Court the respondent states that he claimed constructive dismissal pursuant to the re-designation of his position to Tutti Cello and the adjustment of his salary. It is the respondent's contention that the applicant had no right to do so although he agreed with the applicant's counsel that another musician by the name of Tomas Hurnile had been re-designated from Section Principal, Cello to Tutti Cello and Tomas Hurnile did not claim constructive dismissal. The respondent agreed that he had been formally warned that any future incidences which leads to unnecessary conflicts or behaviour of bad leadership may lead to a demotion from Principal Cello.

D [26] In order to arrive at the decision whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounts to a misconduct. It is only when the impugned act is not a misconduct that the respondent can be successful in his representation under s. 20 of the Act. The learned Chairman referred to the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (supra)* wherein the Supreme Court said *inter alia* that "when the Industrial Court is dealing with a reference under s. 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with just cause or excuse." In the Court of Appeal case of *Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy* [2008] 1 CLJ 760 the court said:

G The first consideration for this must be whether the Industrial Court has applied the right principle of law. As the issue before the Industrial Court concerned an allegation of an employee in breach of a term and condition in her contract of employment due to misconduct it is, in our view, pertinent that the Industrial Court must first determine the meaning of misconduct. To ascertain this, the learned Chairman of the Industrial Court referred to certain decided cases as well as *Halsbury's Laws of Malaysia*, vol. 7, at pp. 120.090-120.0921 which says:

I 'misconduct' connotes to conduct that is inconsistent with the fulfilment of the express or implied conditions of service. Some examples of types of misconduct are ..., wilfully disobeying lawful and reasonable orders or precedents, ... unprofessional conduct and breach of company policy ..., using violence on superior or co-employee.

The court said further:

... in order to arrive at the decision of whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounts to a misconduct. It is only when the impugned act is not a misconduct that the respondent can be successful in her representation under s. 20 of the Act. Thus, it is essential to ascertain what misconduct amounts to and to do so reference should be made to case law as well as reputable text whose opinions are mainly derived from principles enunciated from decided cases on this subject. In fact such approach was approved by the Federal Court in *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181 ...

[27] In considering whether there was constructive dismissal, the learned Chairman dealt with the issue by examining whether the re-designation of the respondent goes against what was provided for under the contract. Upon a consideration of the contract of employment the learned Chairman found that the contract does not provide for re-designation as a punishment. He found that the contract provides under cl. 13.1 only for termination for serious misconduct. On the basis of *Expressway Lingkaran Tengah Sdn Bhd v. Susheela Saminathan* [2006] 1 ILR 505 the learned Chairman states that the employer's right to punish by demotion should be expressly provided contractually or through legislation. In the present case the Chairman found that the applicant's act amounted to a demotion and that the re-designation is a breach that goes to the root of the contract and therefore the respondent was constructively dismissed.

[28] However counsel for the respondent in his submissions before this court says that the power of the applicant to demote was never an issue. If this is the case then there would have been no basis for the Industrial Court to consider this issue and come to a finding that the applicant has no contractual right to demote the applicant. Since it is conceded that the issue was not pleaded that would mean that the Industrial Court had considered an irrelevant matter which amounts to an error of law.

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A [29] In any event I agree with counsel for the applicant that if
the contract of employment permits the applicant to dismiss the
respondent for misconduct hence the applicant would also be
permitted to impose a lesser punishment if the circumstances
warrant it even though the contract of employment contains no
B such provision. From the evidence it is apparent that re-
designation of a higher position to a lower position has been the
course of action taken by the applicant in other cases of
misconduct in the applicant's organization.

C [30] In finding that the respondent has not breached anything, I
find that the learned Chairman has not taken into consideration
the warning letter dated 27 June 2004 which shows that the
applicant had issues regarding the respondent's conduct and which
was not challenged. The learned Chairman has not considered that
D the respondent has not challenged the applicant's right to issue a
warning of a possible demotion in the event of future incidents
happening. Counsel for the respondent submits that the warning
letter was irrelevant. With respect, the warning letter was
specifically mentioned in the letter of re-designation. How could it
E be irrelevant?

[31] As indicated in the case of *Jye Tai Precision Industrial (M)*
Sdn Bhd v. Victoria Arulsamy (supra), misconduct includes 'wilfully
disobeying lawful and reasonable orders or precedents,
unprofessional conduct and breach of company policy'. The
F learned Chairman has not given consideration to the fact that the
respondent is a member of an orchestra where a harmonious and
cordial relationship among the members is a requisite and
unprofessional behaviour is not in the best interest of the
applicant. The fact of the matter is that the respondent was not
G sacked. In fact he was asked to attend rehearsal on 5 January
2005.

[32] I am mindful that that in judicial review proceedings the High
Court does not exercise appellate function. In the case of *Wong*
H *Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another*
Appeal [1995] 3 CLJ 344 Mohd Azmi FCJ said at p. 348:

I In exercising judicial review, the High Court was obliged not to
interfere with the findings of the Industrial Court unless they were
found to be unreasonable, in the sense that no reasonable man or
body of men could reasonably come to the conclusion that it did,

...

In the present case I am of the view that had the learned Chairman considered the totality of the evidence and considered relevant matters, he would not have reached the conclusion that he did. In my opinion a reasonable tribunal would not have reached a conclusion that the respondent was dismissed in the first place. For the aforementioned reasons I allowed the application and quashed the award. Costs of RM30,000 being RM8,000 agreed costs for the preliminary objection and RM22,000 for the substantive application was awarded to the applicant.

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